COMMISSION DECISION

of 14 October 1998

concerning aid granted by Spain to companies in the Magefesa group and their successors

(notified under document number C(1998) 3211)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(1999/509/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 92 and the first subparagraph of Article 93(2) thereof,

Having given notice to interested parties, in accordance with the above provisions, to submit their comments,

Whereas:

I. PROCEDURE

On 16 July 1997 the Commission, after receiving seven complaints in February 1997, decided to initiate the procedure provided for in Article 93(2) of the Treaty in connection with aid received since 1989 by companies in the Magefesa group or the companies which were their successors. (In 1989 the Commission adopted Decision 91/1/EEC [1], in which it found that aid received by the group, which manufactures household goods, was incompatible with the common market.)

On the same date, the Commission asked the Spanish Government for detailed information on the reimbursement of incompatible aid received by companies in the Magefesa group or their successors and on the group's present structure and its legal and financial situation.

In accordance with Article 93(2) of the Treaty, the Commission asked the Spanish Government by letter of 6 August 1997 to submit its comments within a month. The other Member States and third parties were informed in the *Official Journal of the European Communities* [2] of the decision to initiate the procedure provided for in Article 93(2) of the Treaty, and were invited to submit their comments.

The Spanish authorities responded by letter of 12 November 1997 to the initiation of the procedure, providing comments and information.

[1] OJ L 5, 8.1.1991, p. 18.
[2] OJ C 330, 1.11.1997, p. 2.

Two competitors and the trade unions of the company Industrias Domésticas SA (Indosa) submitted their comments by letters dated 28 November 1997. These were passed on to the Spanish authorities for their comments by letters dated 17 and 23 December 1997 and 9 January 1998. The Spanish authorities did not submit comments.

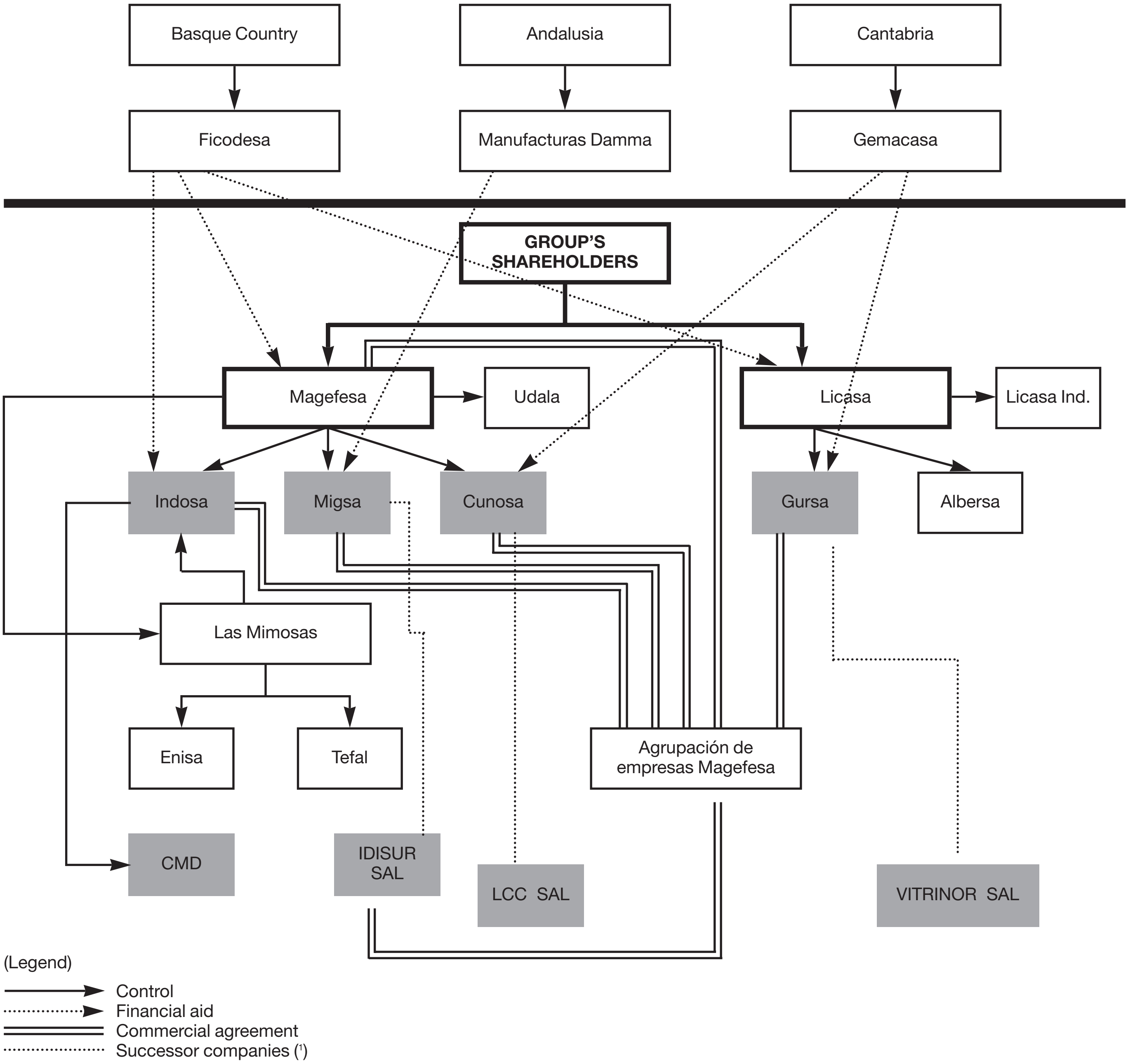
The receiver responsible for Indosa, one of the companies which received aid declared incompatible in 1989 and more recent aid, submitted its comments by letter of 27 November 1997. The substance of these comments was incorporated as an annex in the Spanish Government's abovementioned letter of 24 April 1998.

As the Commission took the view that some issues remained which had not been clarified by the Spanish authorities' response to the initiation of the procedure, the latter were sent a further request for information by letter of 24 February 1998. With the abovementioned letter of 24 April 1998, the Spanish authorities provided a complex document including numerous annexes in support of the information supplied.

II. STRUCTURE OF THE GROUP

The Magefesa group [3] and its successors manufacture household goods such as pressure cookers, saucepans and stainless steel cutlery. The group's structure may be represented as follows:

[3] — Grupo Magefesa includes the main company, Manufacturas Generales de Ferretería (hereinafter referred to as 'Magefesa'), the industrial companies Cuberta del Norte SA (Cunosa), Manufacturas Inoxidables Gibraltar SA (Migsa), Indosa, Investigación y Dessarrollo Udala SA and Las Mimosas SA (Inlamisa), through which Magefesa holds a stake in Edificios y Naves Industriales, SA (Enisa) and Tefal Española SA;
— Grupo Licasa, which includes La Industrial Cuchillería Alavesa SA, Licasa Patrimonial SA Manufacturas Gur SA (Gursa), Alberdi Hermanos SA (Albersa) and Licasa Industrial SA;
— similarly, various companies within the group (Magefesa, Cunosa, Gursa, Migsa, Indosa) formed a commercial group, Agrupación de Empresas 'Magefesa', through which they bought their raw materials and marketed their products.



Note

(1) For the purposes of the present Decision, 'successor companies' means (without this having legal implications) an economic entity in which companies set up by former Migsa, Cunosa and Gursa workers continue working in the same plants, using the same machinery and manufacturing products with the same trade mark as their predecessors.

In December 1985 three intermediary companies were set up by the authorities of the autonomous communities in whose territory the manufacturing companies of the Magefesa group were based, the aim being to provide channels for the aid which was later declared incompatible (in 1989):

— Manufacturas Damma, SA (Manufacturas Damma), based in Andalusia and controlled by the authorities of the Autonomous Community of Andalusia,

— Gestión de Magefesa en Cantabria, SA (Gemacasa), based in Cantabria and controlled by the authorities of the Autonomous Community of Cantabria,

— Fiducias de la cocina y derivados, SA (Ficodesa) in the Basque Country, a private company, though subject to control by the authorities of the Basque Autonomous Community through *ad hoc* agreements.

These companies controlled the use of aid and the implementation of the 'action programme' while at the same time ensuring the continued operation of the Magefesa companies by preventing creditors from enforcing their claims through seizure of the companies' financial resources and stocks of goods. On the basis of agreements, they thus marketed all products manufactured by Magefesa after acquiring them from each of the companies; at the same time

they administered the funds, raw material and semi-finished products needed by the industrial companies.

When the complaints were received in 1997, some of the group's companies had been declared bankrupt (Magefesa, Indosa and Cunosa), while others were not active (Migsa and Cursa). In November 1994 the receiver responsible for Indosa set up Indosa Derio, SL, now known as Compania de Menaje Doméstico, SL (CMD) in order to provide an outlet for Indosa's products. Until 1993, the four manufacturing companies in the Magefesa group (Indosa, Migsa, Cunosa and Gursa) employed over 800 workers.

Indosa now has 330 workers and its turnover for 1997 was approximately ESP 3 000 million. The only industrial company in the group which is still active, it manufactures chiefly pressure cookers and saucepans.

A number of workers formerly employed by Cunosa (now bankrupt) and Migsa and Gursa (not active) set up the Companía de Cubiertos, SAL (LCC), Idisur, SAL (Idisur) and Vitrinor, SAL (Vitrinor) ([4]).

The Agrupación de Empresas Magefesa was dissolved on 29 October 1996.

As regards the intermediary companies, Ficodesa was declared bankrupt in 1995 and Gemacasa and Manufacturas Damma are not active.

III. **AID**

The Commission decided to initiate the procedure provided for by Article 93(2) of the Treaty in respect of the following:

— non-payment of taxes and social contributions by the Magefesa group and its successors,

— Indosa's continued manufacturing activities, despite having been declared bankrupt in 1994, and its failure to fulfil its tax and social security obligations,

— the Basque Government's intention to grant Indosa an ESP 804 million guarantee to back a bridging loan for the period until Indosa received the expected payments from the salary guarantee fund (Fogasa) ([5]) and the Ministry of Labour,

— payments actually made by Fogasa and the Ministry of Labour to the companies of the Magefesa group, or which they planned to make.

As mentioned above, the presumed failure to recover incompatible aid dating back to 1989 was also taken into consideration when the Commission decided to initiate the procedure provided for in Article 93(2) of the Treaty; it then stated that it would consider the compatibility of any aid granted in view of what had happened to the recovery of the following aid, declared incompatible by Decision 91/1/EEC:

— *a loan subject to conditions different from those obtaining on the market* to the value of ESP 2 085 million, granted by Fogasa for the payment of compensation to workers dismissed as a consequence of the ‘action programme’,

— *loan guarantees* totalling ESP 1 580 (ESP 972 million from the Basque Government, ESP 512 million from the Government of the Autonomous Community of Cantabria and ESP 96 million from the Andalusian Government) ([6]),

— *non-refundable grants* totalling ESP 1 094 million (ESP 803 million from the Basque Government, ESP 262 million from the Government of the Autonomous Community of Cantabria and ESP 29 million ([7]) from the Andalusian Government ([8]),

([4]) SAL is the acronym of *sociedad anónima laboral*, a limited company set up by the workers themselves. LCC, Idisur and Vitrinor were set up on 9 June 1994, 22 April 1993 and 27 March 1995 respectively. Idisur concluded a commercial agreement with the Agrupación de Empresas Magefesa on 1 October 1993.

([5]) Regulated by Royal Decree 505/1985 of 6 March 1985.

([6]) Loan guarantees: (i) ESP 972 million granted by the Basque Government on the basis of two decisions taken in connection with Decree 150/1985 of 11 June 1985, as follows: guarantee of ESP 300 million granted on 21 January 1986 directly to Indosa; and guarantee of ESP 672 million, granted on 3 June 1986 to Ficodesa for use by the companies of the Magefesa and Licasa subgroups based in the Basque Country; (ii) guarantee of ESP 512 million, granted by the authorities of the Autonomous Community of Cantabria in March 1986 to Gemecasa, for use by Cunosa and Gursa; (iii) guarantees totalling ESP 96 million, granted by the *Sociedad para la Promoción y Reconversión Industrial de Andalucía* (Soprea, today known as the *Instituto de Fomento de Andalucía*) to Manufacturas Damma on 14 February 1986 and 5 February 1987 for use by Migsa.

([7]) The sum of ESP 39 million, referred to in Decision 91/1/EEC and in the decision to initiate this procedure, has been corrected on the basis of documents submitted by the Spanish authorities.

([8]) Grants: (i) grant of ESP 803 million awarded by the Basque Government on 3 June 1986 to Ficodesa ‘for deployment’ within the companies of the subgroups Magefesa and Licasa, based in the Basque Country, on the basis of decisions adopted under Decree 150/1985 of 11 June; (ii) grant of ESP 262 million awarded by the Autonomous Community of Cantabria in October 1986 to Gemacasa, for deployment within Cunosa and Gursa; (iii) grant of ESP 29 million awarded by the authorities of the Autonomous Community of Andalusia to Manufacturas Damma on 29 May 1987 under Decree 93/1987, with a view to supporting the social measures underpinning the relaunch of Migsa.

— *subsidisation of interest payable on loans*, totalling ESP 9 million.

The Spanish Government was asked to recover the incompatible aid granted by Fogasa and the Governments of the Autonomous Communities of the Basque Country, Cantabria and Andalusia by the following means:

— the *loan subject to conditions different from those obtaining on the market* to the value of ESP 2 085 million, granted by Fogasa, was to be converted into loans subject to market conditions or be terminated; alternatively, some other measure was to be taken which would ensure complete elimination of the aid component,

— the *loan guarantees* totalling ESP 1 580 million were to be terminated,

— the *grants* totalling ESP 1 094 were to be recovered.

IV. COMMENTS BY INTERESTED PARTIES

The following comments were received from interested third parties:

— a competitor pointed out that Vitrinor, the workers' cooperative set up by a number of workers formerly employed by Gursa, was using Gursa's plant free of charge,

— another competitor pointed out that: (i) the incompatible aid had not been repaid; (ii) Indosa had not paid taxes or social contributions since the adoption of Decision 91/1/EEC; (iii) Magefesa's products were being sold at prices 33% below those of its competitors; (iv) the receivers, appointed by the national authorities and the authorities of the autonomous communities concerned, had allowed all this to take place,

— the trade union representatives indicated that Fogasa had intervened on behalf of the workers, not the company. They also informed the Commission that the workers had set up a pension fund using their own resources.

The receiver responsible for Indosa, one of the companies which had received both aid declared incompatible in 1989 and fresh aid, submitted its comments by letter of 27 November 1997. The substance of these comments was incorporated in the form of an annex to the letter of 24 April 1998 from the Spanish Government, referred to in section VI.

V. SPAIN'S RESPONSE TO THE INITIATION OF THE PROCEDURE

(a) Recovery of aid declared incompatible in 1989

As regards the recovery of the aid declared incompatible by Decision 91/1/EEC, the situation may be summarised as follows:

It was decided in 1990 to convert the *loan subject to conditions different from those obtaining on the market*, which amounted to ESP 2 085 million, into a loan subject to market conditions. However, since the companies failed to respect the terms of the loan [9], Fogasa again had recourse to enforced collection, giving rise to the seizure of the trade marks of the Magefesa group.

As regards the *loan guarantees* to the total value of ESP 1 580 million and the *non-refundable grants* totalling ESP 1 104 million, made available by the Governments of the Autonomous Communities of the Basque Country, Cantabria and Andalusia, the Council of State — Spain's supreme consultative body — was consulted in 1990 as to how Spain should implement Decision 91/1/EEC.

As regards the *loan guarantees*, the Council of State ruled that the Governments of the Autonomous Communities concerned had to put the guarantees into effect immediately and then recover the sums concerned from the beneficiaries; as for the *non-refundable grants*, the Government of the Autonomous Communities had to revoke the decisions awarding them, after which they were to recover the sums already paid.

The Governments of the Autonomous Communities took the following action:

— *Basque Government*: the *loan guarantees* were put into effect immediately as recommended by the Council of State, but between 1989 and 1993, to the value of ESP 1 365 717 623 (including principal and interest). Following a fruitless request for reimbursement, a demand for enforced reimbursement was made, which did not produce any results either. The Basque Government decided to declare null and void the decision to award the *non-refundable grants*, taken in March 1994, that is, more

(9) As explained under (b) of this section, loans subject to conditions different from those applying on the market were granted within the framework of a 'refund agreement', under which Fogasa, having been surrogated by law to the workers' rights with respect to the debtor companies, and on the basis of the applicable legislation, decided not to initiate enforcement procedures immediately, but to conclude a 'refund agreement'. As the 'refund agreement' was not respected, Fogasa remained at liberty to continue with enforced recovery.

than four years after the notification of Decision 91/1/EEC. A demand for payment was sent to Ficodesa on 25 January 1995, by which time the company had already been declared bankrupt (on 19 January 1995).

Both types of claim *(loan guarantees and grants)* were included in the list of Ficodesa's creditors. The Spanish authorities have not informed the Commission of the ranking of these claims. Since they are public claims, they should have the same degree of preference as that extended to other public claims under the Spanish legal system,

— *Government of the Autonomous Community of Andalusia:* having put into effect the loan guarantee of ESP 96 million and after demanding, unsuccessfully, that Manufacturas Damma pay the guaranteed sum, the Instituto de Fomento de Andalucía (Institution for the Promotion of Andalusia, IFA), the owner of Manufacturas Damma, declared the said loan guarantee irrecoverable on 17 June 1993. As regards the *non-refundable grants* to the value of ESP 29 million, the authorities of the Autonomous Community of Andalusia stated that although the procedure to cancel the decision awarding the grant had begun on 21 November 1990, the recovery procedure had not been carried forward because Manufacturas Damma had no assets which were free of charges,

— *Government of the Autonomous Community of Cantabria:* the *loan guarantees* were not put into effect immediately, as recommended by the Council of State, but during the period 1994-95. The Spanish authorities have not provided any detailed information on the refund of grants; rather, they have confined themselves to pointing out that Cunosa and Gursa had no assets free of charges and that any measures taken by Gemacasa to recover aid would therefore have been fruitless. They have not explained why Gemacasa or the Government of the Autonomous Community did not include the incompatible aid granted to Cunosa in the list of the latter's creditors.

(b) **New aid granted after adoption of Decision 91/1/EEC**

Payments made by Fogasa and the Ministry of Labour and Social Affairs

The Spanish authorities have stated that in the event of insolvency or bankruptcy of an employer, it is Fogasa which pays compensation to workers, and is thus subrogated by law to their rights, for the amounts legally established only. This means that Fogasa can initiate or pursue enforced collection procedures against the company to recover the sums it has paid to workers. Fogasa can choose not to have immediate recourse to the enforced collection procedure and instead to conclude a 'refund agreement', the signing of which entails suspension of legal collection measures. According to the Spanish authorities, this is the case particularly when the said payments have been made to workers after examination of each case to establish that the workers are indeed entitled to them. The conclusion of refund agreements is decided on a case-by-case basis. The decision to conclude them must combine 'the efficacy of the subrogatory measure with the requirements of business continuity and employment safeguards' (Section 32 of Royal Decree 505/1985). The methods and conditions for the conclusion of such agreements are laid down by Ministerial Order of 20 August 1985.

According to the information supplied by the Spanish authorities, Fogasa and the Magefesa group have not concluded refund agreements of the type declared incompatible by Decision 91/1/EEC, which laid down refund terms different from those obtaining on the market.

As for the special grants awarded by the Ministry of Labour and Social Affairs to Indosa workers whose employment contracts had been terminated, the Spanish authorities stated that a total of ESP 437 571 733 was paid on 5 March 1997 to 120 Indosa workers, to guarantee them more appropriate unemployment cover and pension rights after the termination of their contract with Indosa.

Persistent non-payment of taxes and social security contributions

The Spanish authorities have detailed the amount of tax owed to the National Treasury and the social security contributions which have remained unpaid since 1989, both before and after Indosa, Cunosa and Magefesa were declared bankrupt. No figures have been supplied on the taxes owed to the Vizcaya Regional Treasury for the period after Indosa was declared bankrupt. As for Gursa and Migsa, which have now stopped operating, a summary has been provided of the measures adopted by the National Treasury and the Social Security with regard to the sums owed. It has also been explained why Vitrinor and Idisur were not declared responsible for the debts incurred by Gursa and Migsa respectively, as their successors: the new companies were legally independent of their predecessors and had been set up by the workers after the termination of their employment contracts.

Aid granted to other companies

The regional authorities of Andalusia provided information on the regional aid received by Idisur.

VI. ADDITIONAL INFORMATION REQUESTED IN THE COURSE OF THE PROCEDURE AND THE REPLY FROM THE SPANISH AUTHORITIES

By letter of 24 February 1998, the Commission requested further detailed information on the following matters:

— it requested a list of the creditors of the companies declared bankrupt (Magefesa, Indosa and Cunosa), including the sum involved and the relative priority of the claim,

— it asked why, if the non-active companies (Migsa and Gursa) were insolvent, the administration had not initiated bankruptcy proceedings, like any diligent creditor. It also requested information on the conditions under which the assets of the said companies had been transferred to the new companies set up by the workers (Idisur and Vitrinor),

— as regards Indosa's 'bankruptcy followed by continued activity', the Commission asked why the receivers, two of whom had been appointed on a proposal from the Social Security and the Vizcaya Regional Treasury, had allowed Indosa to continue operating after the declaration of bankruptcy. It requested copies of any judicial decision or creditors' agreement which might legitimise this situation. It also requested information on the debt contracted with the National Treasury, the Regional Treasury and the Social Security following the bankruptcy declaration,

— the Spanish authorities were asked to provide information about any aid granted to Vitrinor and Idisur, which were set up by former workers using the assets of Gursa and Migsa respectively.

By letter of 24 April 1998, the Spanish authorities submitted a complex document including numerous annexes to back up the information provided.

(a) **Recovery of aid declared incompatible in 1989**

The Governing Councils of the Autonomous Communities of Andalusia and Cantabria considered that the aid declared incompatible should be repaid by the intermediary companies through which it was channelled, i.e. Manufacturas Damma (Andalusia) and Gemacasa (Cantabria), since — formally speaking — it was they which had received the grants and benefited by the guarantees. According to the Spanish authorities, during the implementation of the action programme Gemacasa became a creditor of Cunosa and Gursa. The latter companies owed Gemacasa unspecified sums which, given their critical situation, were never repaid. The Spanish authorities confirmed that Manufacturas Damma, a creditor of Migsa, was sold to Migsa for the symbolic price of one peseta in June 1993, which meant that no further action was taken to recover the incompatible aid. The authorities of the Autonomous Community of Andalusia stated that no measures were taken to have Manufacturas Damma declared bankrupt because it was felt that it would be imprudent for the company's sole shareholder to take such action.

No further information was provided about the aid granted by the authorities of the Basque Autonomous Community.

(b) **New aid granted after adoption of Decision 91/1/EEC**

Payments made by Fogasa and the Ministry of Labour and Social Affairs

The Spanish authorities submitted a list of the sums paid by Fogasa to the workers of Indosa, Gunosa, Migsa and Gursa, as well as confirmation of the payments made by the ministry of Labour to Indosa's workers. This information shows that Fogasa approved the following payments over the 1989-1998 period:

	(ESP)
Indosa	416 455 625
Gursa	612 972 521
Cunosa	81 813 513
Migsa	198 413 068

As regards the complaints about the fact that Indosa had asked Fogasa and the Ministry of Labour and Social Affairs for new aid and that the Basque Government planned to grant an ESP 1 000 million guarantee for a bridging loan until such time as the new aid arrived, the Spanish authorities have confirmed that Indosa asked the Basque authorities in September 1996 for aid to cover the dismissal of 120 workers through early retirement. As a consequence of the decision to initiate the procedure provided for in Article 93(2) of the Treaty, in which decision the Commission reminded the Spanish authorities of the suspensory effect of Article 93(3), the Basque Government decided not to grant the guarantee of ESP 804 million.

As regards the intervention of the Ministry of Labour and Social Affairs on 9 August 1996, the Basque Government authorised the termination of 120 employment contracts with Indosa staff. On 18 November 1996 the Ministry of Labour granted exceptional aid in order to augment unemployment benefit and the base for pension contributions. This measure was based on a Ministerial Order of 5 April 1995 on social emergencies involving workers. The purpose of the measure was to allow workers: (i) to benefit from the highest possible level of unemployment protection throughout the 24 months following the termination of their contracts; and (ii) to obtain early retirement under better financial conditions. On 5 March

1997, ESP 437 471 733 was paid to Indosa workers whose employment contracts had been terminated. The Spanish authorities stressed that the payment of this sum was in the interests of a number of workers who were particularly at risk.

Persistent non-payment of taxes and social security contributions

Lists of Indosa's and Cunosa's creditors were submitted, along with the totals of unpaid taxes and social security contributions. The latter were as follows.

Amounts owed by bankrupt companies

(ESP million)

	Social Security	NationalTreasury	RegionalTreasury
Indosa [1]	4 602	210	1 898
Cunosa	1 772	790	—

[1] The next section deals with the issue of Indosa's debt under this heading which has arisen since the declaration of bankruptcy.

Total amount: ESP9 272 million.

The taxes and social security contributions which have not yet been paid by the non-active companies (Migsa and Gursa) are as follows.

Amounts owed by non-active companies

(ESP million)

	Social Security	National Treasury
Migsa	586	No data available [1]
Gursa	2 767	525

[1] This amount does not include the debt contracted by Migsa with the National Treasury. According to the letter from the Spanish authorities of 12 November 1997, the Sistema Informático de Recaudación ('computerised collection system') does not register the sums owed because it has been decided to declare these debts irrecoverable.

Total amount for the 'non-active' companies: ESP 3 878 million.

The total for all bankrupt or non-active companies is ESP 13 150 million, or ECU 78,82 million [10].

The Spanish authorities stated that they had not called for Migsa and Gursa to be declared bankrupt, as any diligent creditor would have done, because the procedures preceding the declaration of bankruptcy were lengthy and costly and it was their practice not to take action on purely formal grounds, but only when there was a real possibility of recovering the funds concerned. They had, at any rate, applied the enforced collection procedure of seizure to Migsa and Gursa, but it had proved unsuccessful because neither had any assets free of charges.

The Spanish authorities also provided information about the seizure procedures applied to Indosa and Cunosa before they were declared bankrupt at their employees' instigation.

As regards the way in which Idisur and Vitrinor were established, the Spanish authorities stated that Migsa and Gursa were still the owners of the plants concerned, which had been leased to new companies, these having been set up by a number of former employees.

Persistent non-payment of taxes and social security contributions after Indosa's declaration of bankruptcy

The declaration of bankruptcy includes the following claims by public bodies:

(ESP)

Social Security	4 602 668 983
Regional Treasury	1 596 191 052
Fogasa	413 935 458
National Treasury	134 102 630
Basque Government	2 800 200
Total	6 749 698 323

The total sum, equivalent to ECU 40,17 million, represents over half of the claims recognised in the context of Indosa's bankruptcy procedure [11]. The Spanish authorities have supplied no information on the relative priority of these claims.

In the course of the proceeding under Article 93(2) of the Treaty, the Spanish Government has not submitted any copies of a judicial decision establishing bankruptcy in combination with continued activity. However, the Spanish authorities have submitted the document issued by the meeting of Indosa's creditors on 30 January 1995, which did confirm this.

Although the application for the declaration of bankruptcy explicitly called on the court to rule that Indosa should continue its industrial activity, the court did not give any ruling on this matter in its decision of 19 July 1994 declaring

[10] The sums are given in ecu for illustrative purposes only (ECU 1 = ESP 166,822).

[11] The total sum is ESP 12 439 688 347, which is equivalent to ECU 74,56 million. This sum does not include the aid to Indosa which was declared incompatible in 1989.

Indosa bankrupt. Six months later, on 30 January 1995, a meeting of creditors was called in order to appoint the receivers in bankruptcy. The main creditors (the Social Security and Vizcaya Regional Treasury) proposed two of the three receivers to be appointed under Spanish law. The remaining creditors proposed the third. All three were accepted after a vote. The legal representative of the instigator of bankruptcy then asked the creditors to give their views on the fact that industrial activity was continuing. According to the record of the meeting, only Fogasa and the Municipality of Derio [12] said they were in favour of continued activity. No opposing views were expressed. The record of the meeting contains no evidence of any opposition by the Social Security, the national authorities or the authorities of the Autonomous Community, which, given the scale of their claims, had sufficient votes to block approval of Indosa's continued activity.

During the period between the declaration of bankruptcy (19 July 1994) and April 1997, unpaid social contributions rose to ESP 1 282 117 590. Although the Spanish authorities have been requested to inform the Commission of the tax debt run up during this period with the Vizcaya Regional Treasury, they have not done so.

The Spanish authorities have confirmed that Indosa has kept up to date with its tax and social security obligations since May 1997.

Aid granted to other companies

As regards the granting of other aid, the Spanish authorities have confirmed that Vitrinor did not receive any aid and also supplied an updated list of public measures benefiting Idisur.

In view of the special nature of the Idisur case, in which aid has presumably been granted, at least in part, in the context of regional aid schemes approved by the Commission, this matter is not covered by the present Decision and will therefore be dealt with in the appropriate manner in due course.

VII. **LEGAL ASSESSMENT**

Article 92(1) of the Treaty lays down the principle that, save as otherwise provided in the Treaty, any aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

The products marketed by the companies of the Magefesa group are traded between the Member States and there is competition between manufacturers. Moreover, the Magefesa group operated on Community markets in the past and was one of Spain's main manufacturers in the sector concerned.

According to a 'viability plan' presented by Indosa in early 1996, Magefesa's products accounted in 1990 for 39% of the Spanish market in pressure cookers and 37% of the market in saucepans. In 1994, the market shares of these products were 23% and 13% respectively.

In the years before the declaration of bankruptcy or the interruption in the activities of the companies concerned, intra-Community trade in stainless steel kitchenware and household goods (excluding those for use at table) and stainless steel cutlery (CN codes 7323 93 90, and 8215 20 10) amounted in 1990 to ECU 251,6 million and ECU 38,6 million respectively, and in 1992 to ECU 281,6 and ECU 38,9 million respectively. Spain declared that its trade with the other Member States accounted for the following sums: in 1990, ECU 17,9 million and ECU 3,2 million respectively, and in 1992, ECU 17,7 million and ECU 2,6 million respectively.

After Indosa was declared bankrupt in 1994, intra-Community trade in stainless steel kitchenware and household goods (excluding those for use at table) (CN code 7323 93 90 amounted to ECU 181,3 million. In the same year Spain declared that its trade with the other Member States accounted for ECU 16,7 million. In 1997, intra-Community trade in these products rose to ECU 230,6 million. In the same year, Spain declared that its trade with the other Member States accounted for ECU 17,5 million.

Article 92(1) of the Treaty states that any aid of the nature described in that paragraph is, in principle, incompatible with the common market. Article 92(3) of the Treaty lists the types of aid which may be considered compatible with the common market. Compatibility with the common market must be established in the context of the Community as a whole, not in that of a single Member State. In order to ensure the proper functioning of the common market, and bearing in mind the objective laid down under Article 3(g) of the Treaty, the exceptions listed in Article 92(3) of the Treaty must be interpreted strictly when examining aid schemes or authorising an individual aid measure.

To be precise, these exceptions can be relied on only when the Commission concludes that, if no aid were granted, market forces alone would not suffice to guide the beneficiaries towards patterns of behaviour conducive to any of the objectives referred to in Article 92(3). Making such exceptions in cases which do not further these objectives or in which aid is not necessary to achieve this aim would entail granting advantages to the industries or companies of certain Member States which would strengthen them financially, thereby adversely affecting trading conditions between the Member States and distorting competition without any justification on any of the common interest grounds listed in Article 92(3) of the Treaty.

(a) **Recovery of aid declared incompatible in 1989**

As was stated at the start of the procedure, it is appropriate to look at the recovery of the aid declared incompatible by

[12] Derio (Vizcaya) is the municipality where Indosa is based.

Decision 91/1/EEC when examining the new aid granted to the same companies. In accordance with the decision of the Court of Justice of the European Communities of 15 May 1997 in Case C-355/95 P, *Textilwerke Deggendorf v. Commission and Germany* [13], it is the Commission's responsibility, when examining new aid, to assess the cumulative effect in terms of distortion of the market of new aid and unrecovered incompatible aid.

As regards the loan of ESP 2 085 million granted by Fogasa under conditions different from those obtaining on the market, it was decided in 1990 to convert it into one based on market conditions. However, when the companies failed to respect the terms under which the loan had been granted, Fogasa again started enforced collection procedures, which resulted in the seizure of the trade marks of the Magefesa group; enforced collection procedures are currently still in progress.

As for the loan guarantees totalling ESP 1 580 million and the non-refundable grants totalling ESP 1 104 million awarded by the Governments of the Autonomous Communities of the Basque Country, Cantabria and Andalusia, the information provided by the Spanish authorities leads to the following conclusions:

— *Government of the Basque Autonomous Community:* the first guarantee, to the value of ESP 300 million, was granted to Indosa on 21 January 1996. The second, to the value of ESP 672 million, was granted to Ficodesa on 3 June 1986 for use by Indosa and the other companies of the Magefesa group based in the Basque Country. Without these two guarantees, Indosa and the other companies would have been forced to stop operating, because their situation was such that they could not take out loans in order to stay in business. As for the grants to the value of ESP 803 million, it should be recalled that they were awarded to enable the Magefesa group to pay the part of the wages and compensation which Fogasa had not advanced to the workers, because the sum involved exceeded its overall maximum limits. Moreover, the aim was to reduce costs for Indosa and the other companies, not for Ficodesa. In the Commission's view, its Decision 91/1/EEC cannot be considered to have been implemented merely because the sum of ESP 2 168 717 623 has been included in the list of Ficodesa's creditors. Firstly, it should be pointed out that the authorities of the Autonomous Community acted slowly when withdrawing the loan guarantees and recovering the grants. Secondly, by including the two loans only in the list of Ficodesa's creditors and not in Indosa's or those of the other companies of the Magefesa group based in the Basque Country, the authorities of the Basque Autonomous Community have acted as though Ficodesa were the sole beneficiary of the incompatible aid and it were up to Ficodesa alone to pay it back. The reality was very different, as Ficodesa was only an intermediary company with no productive capacity of its own, set up for the sole purpose of channelling the financial aid granted by the Government of the Basque Autonomous Community to Indosa and the other companies of the Magefesa group based in the Basque Country.

  The above shows that the incompatible aid granted by the Basque Government has not been duly recovered, as the companies which received aid have not been required to repay it,

— *Government of the Autonomous Community of Andalusia:* Manufacturas Damma was only an intermediary without any manufacturing activity, set up for the sole purpose of channelling the financial aid granted by the Government of Andalusia to Migsa, the industrial company belonging to the Magefesa holding company and based in Andalusia. The non-refundable grants, totalling ESP 29 million, enabled Migsa to pay the share of wages and compensation which it owed the dismissed workers. In other words, it was Migsa, not Manufacturas Damma, which benefited from reduced expenses. Moreover, Migsa would have been forced to stop operating if it had not benefited from loan guarantees totalling ESP 96 million, as its situation prevented it from obtaining loans to continue operating. The Commission does not believe that the measures taken by the Government of Andalusia comply fully with its Decision 91/1/EEC. Neither does it share the Spanish Governments's view that the incompatible aid was granted to Manufacturas Damma rather than Migsa and that it is therefore the latter which should be called on to repay the aid.

  The above shows that the incompatible aid granted by the Government of Andalusia has not been duly recovered, since the company which benefited has not been required to pay back the aid,

— *Government of the Autonomous Community of Cantabria:* for the same reasons as with the Basque and Andalusian authorities, the incompatible aid granted by the Autonomous Community of Cantabria appears not to have been duly recovered, since the beneficiaries have not been required to pay back the aid.

  In the light of the Deggendorf case, it was appropriate to look at the recovery of the aid declared incompatible by Decision 91/1/EEC before examining the new aid granted to the same companies.

(b) **New aid granted after the adoption of Decision 91/1/EEC**

Payments made by Fogasa to the workers of Indosa, Cunosa, Migsa and Gursa between 1989 and 1998 and by the Ministry of Labour and Social Affairs to Indosa workers

Fogasa's payments were made on the basis of a subrogation by law to the rights of the insolvent company's employees. Fogasa's measures are universally and automatically applicable, without sectoral restrictions, to any worker who meets the requirements laid down in the regulations. Moreover,

(13) [1997] ECR I–2549.

according to the information provided by the Spanish authorities, Fogasa and the Magefesa group have not concluded 'refund agreements' like that declared incompatible by Decision 91/1/EEC, which established loan conditions different from those applicable on the market.

According to the information available to the Commission, the special grants made by the Ministry of Labour to workers who had lost their jobs constituted a public measure to guarantee those workers a better level of unemployment benefit. Moreover, this exceptional decision was taken after the termination of the employment contracts of the Indosa workers concerned and as a result they received social benefits topping up the benefits which the company was legally obliged to pay out. It cannot be argued that this measure benefited the company itself and it does not, therefore, constitute aid to Indosa, but rather exceptional aid with an essentially positive impact on the social situation of the workers concerned.

The Commission's investigation has not, therefore, established the existence of an aid component in the above measures.

Persistent non-payment of taxes and social security contributions

According to information supplied by the Spanish authorities, the companies in the Magefesa group have systematically failed to meet their tax and social security obligations since 1989 (as they did prior to that date), despite any forced recovery procedures which may have been initiated or instigated by the administration (seizures and payment orders).

It was only on the initiative of the workers themselves that Indosa and Cunosa were declared bankrupt. The sums owed to public creditors were included in the list of Magefesa's, Indosa's and Cunosa's creditors because this is the proper procedure under Spanish national law to ensure that the Social Security and the national and regional Treasuries retain the possibility of recovering at least a proportion of their claims. Cunosa is currently undergoing liquidation. The Spanish authorities have submitted written evidence showing that CMD (a branch of Indosa) and LCC (Cunosa's successor) were up to date with their tax and social security payments.

The national Treasury and the Social Security declared their claims on Migsa and Gursa irrecoverable, with the exception of Gursa's debts towards the national Treasury. No bankruptcy proceedings were instituted against either of the two companies. New companies were set up by a number of the former employees of Migsa and Gursa: Idisur (22 April 1993) and Vitrinor (27 March 1995) respectively. The new companies signed agreements with their predecessors on the use of their machinery and plant. The Spanish authorities have demonstrated that Idisur and Vitrinor are up to date with payments to the national Treasury and the Social Security.

The Spanish authorities explain that bankruptcy proceedings were not initiated because the costs incurred would have exceeded the estimated sums potentially obtainable by auctioning off the debtor's assets. In such cases the decision to initiate bankruptcy proceedings requires an analysis of the cost in each individual case. This analysis revealed here, according to the Spanish authorities, that it was more cost effective to declare the claims of public creditors irrecoverable than to initiate bankruptcy proceedings. Apart from this general statement, however, they have not presented any comparative analyses setting out the costs of the various options. Moreover, even if a cost analysis showed that there were a comparative advantage in not initiating bankruptcy proceedings, the fact remains that, in a situation like that described by the Spanish authorities in which the absence of assets not free of charges renders any forced recovery procedure (seizure, payment orders, etc.) ineffective, the non-initiation of bankruptcy proceedings has enabled the companies in question — unlike their competitors — to continue operating without meeting their tax and social security obligations, all this despite their extremely precarious position. The huge sums of unpaid taxes and social security contributions resulting precisely from the continued activity of the companies concerned undoubtedly exceed the cost of a bankruptcy procedure.

The Commission has also investigated whether the public creditors behaved in the way they did with a view to maximising their chances of recovering unpaid taxes and social security contributions. The Spanish authorities have not stated or suggested that such was the case at any stage of the procedure laid down in Article 93(2) of the Treaty. On the contrary, the continued operation of the companies concerned has resulted in a considerable increase in the taxes and social security contributions remaining unpaid ([14]). Moreover, Migsa's and Gursa's debts have been declared irrecoverable (Gursa's debt with the national Treasury being an exception). In the cases of Indosa and Cunosa, it was the workers who started the bankruptcy proceedings.

If the arguments put forward by the Spanish authorities were accepted, any company without assets free of charges — that is, any company on which forced recovery proceedings would have no purchase — could continue to operate on the market without fulfilling its tax and social security obligations as long as other possible creditors did not instigate bankruptcy proceedings against it.

Consequently, the Commission concludes that the persistent and systematic non-payment of taxes and social security contributions since 1989 and up to the declaration of bankruptcy or the breaking-off of activities constitutes a transfer of public resources to Indosa, Cunosa, Migsa and Gursa which gives them a competitive advantage, since — unlike their competitors — they are not obliged to defray these costs as would ordinarily be the case. This situation therefore constitutes aid as described in Article 92(1) of the Treaty.

The fact that neither the Treasury nor the Social Security have stated formally that they no longer intend to collect the sums

([14]) As indicated in the report on the bankruptcy of Indosa submitted by the bankruptcy commissioner on 4 October 1995, some of the unpaid taxes date back to 1982.

owed (which means that the latter still legally constitute a debt and have not been cancelled) does not detract from the fact that the companies have been able to operate without fulfilling their tax and social security obligations [15]. Over the same period, their competitors have not benefited from such financial advantages. The sums in question supplied by the Spanish authorities are as follows:

(ESP)

	Social Security	National Treasury	Treasury of Autonomous-Community
Indosa	4 602 668 983	210 794 754	1 898 219 433
Cunosa	1 772 814 657	790 999 650	—
Migsa	586 934 823	To be determined	—
Gursa	2 767 769 021	525 401 696	—

The Commission has not been informed of the total amount of national taxes not paid by Migsa. It is the responsibility of the Spanish authorities to supply this information.

Persistent non-payment of taxes and social security contributions after Indosa's declaration of bankruptcy

Initiation of the procedure under Article 93(2) of the Treaty has enabled the Commission to confirm that the allegations put forward by complainants regarding Indosa's persistent failure to fulfil its tax and social security obligations between the declaration of bankruptcy on 19 July 1994 and May 1997 were correct and justified. Moreover, this procedure has also enabled the Commission to establish the existence of aid within the meaning of Article 92(1) of the Treaty.

Bankruptcy followed by 'continued activity' is not provided for as such under current Spanish law. Given the nature of the bankruptcy laws and the size of the public claims, continuing to operate without meeting tax and social security obligations further damages the interests of the Treasury and the Social Security, in that persistent non-payment automatically reduces the bankrupt's assets: the debts resulting from the administration of the assets, such as taxes and social security contributions, have to be paid first, taking priority over debts towards other creditors.

The Commission concludes from the documents submitted by the Spanish Government that Indosa was able to continue operating after the declaration of bankruptcy because the meeting of its creditors, held on 30 January 1995, agreed to this. The record of the meeting contains no references to opposition by the Social Security or the national or regional Treasuries. Given the size of their claims, these institutions, together with the other public creditors, had enough votes to block consent to Indosa's continued operation.

The Spanish authorities have not provided any explanation as to why the public creditors did not exercise their right to veto such consent.

The above implies that the meeting of Indosa's creditors accepted its continued operation after the declaration of bankruptcy as a result of the behaviour of the public creditors at the meting of 30 January 1995.

The Commission has investigated whether the public creditors behaved in this way with a view to maximising their chances of recovering their claims, which totalled ESP 6 749 698 323. At no stage of the procedure laid down by Article 93(2) of the Treaty have the Spanish authorities stated or suggested that this was the case. However, the public creditors, particularly the Social Security and the Basque Regional Treasury, knew that if Indosa, which was bankrupt, continued to operate, it was likely to run up further debts, given its difficult situation and its tax record (it had avoided paying the Social Security or the Treasury for years). They should therefore at least have made continued activity conditional on Indosa's meeting its current tax and social security obligations, in order to avoid running up further debt. Given the nature of bankruptcy laws, such an increase would automatically reduce the bankrupt's assets, as debts arising from the administration of the bankruptcy, such as those generated by the non-payment of taxes and social contributions, take precedence over other claims. A private creditor would not have behaved in a way likely to reduce the chances of recovering his claim.

The behaviour of the public creditors has been influenced by different aspects of the State's commitment to guarantee as far as possible the recovery of their claims against the bankrupt company. Moreover, the fact that large amounts of taxes and social security contributions remained effectively unpaid between July 1994 and April 1997 shows that Indosa's continued operation has supported economic activities which would have been unsustainable in any other way under normal market conditions.

The Commission takes the view that the non-payment of taxes and social security contributions constitutes a transfer of public funds to Indosa, giving it a competitive edge; unlike its competitors, it does not have to cover this particular cost in the normal way. This analysis is not affected by the fact that

(15) Advocate-General Jacobs stated in his opinion of 24 September 1998 in Case C-256/97, *D. M. Transport*, that it was clear that, in certain circumstances, continued generous tolerance of the delayed payment of social security contributions could confer a considerable commercial advantage on the beneficiary company, and that it could, in extreme cases, amount to debt forgiveness with regard to those contributions (paragraph 33).

the beneficiary of this transfer is Indosa in its capacity as the assets of the bankruptcy, not Indosa the company.

The fact that neither the Treasury nor the Social Security have formally stated their intention to abandon their claims (which means that they still constitute debt, legally speaking, and have not been written off) does not detract from the fact that the company has been able to operate without meeting its tax and social security obligations [16]. Indosa's rivals did not enjoy the same financial advantage during the same period. Moreover, the debts arising from the non-payment of taxes and social security contributions after the declaration of bankruptcy are covered by the administration of the bankruptcy (debts payable from the bankrupt's assets) and, under Spanish law, may be subject to separate forced collection procedures. The information supplied by the Spanish authorities shows that no separate enforced collection procedure has been initiated, despite the considerable size of the debt arising from the non-payment of taxes and social security contributions.

It may thus be concluded that Indosa's persistent non-payment of social security contributions totalling ESP 1 282 117 590, in addition to the non-payment of an unspecified amount of tax during the period between the declaration of bankruptcy (19 July 1994) and April 1997, after all Indosa's public creditors had accepted that it would continue operating without any financial guarantees, constitutes aid within the meaning of Article 92(1) of the Treaty.

The Commission has not been informed of the total amount of tax owed to the regional Treasury of Vizcaya. It is the Spanish Government's responsibility to supply this information.

The persistent non-payment of taxes and social security contributions:

— by Indosa, Cunosa, Migsa and Gursa until the declaration of bankruptcy or the break in activities,

— by Indosa after the declaration of bankruptcy,

is thus considered to constitute aid within the meaning of Article 92(1) of the Treaty.

This aid was not granted as part of an authorised aid scheme and should therefore have been notified on an individual basis, as stipulated by Article 93(3) of the Treaty. The Spanish authorities' failure to meet this requirement means that the aid was granted illegally. The exceptions provided for by Article 92(2) of the Treaty are not applicable in this case, since the aid was not granted to achieve the objectives set out in Article 92(2). The Spanish Government has not invoked Article 92(3) of the Treaty in connection with the measures deemed by the present Decision to constitute aid.

As regards the derogations provided for by Articles 92(3)(a) and (c) of the Treaty for aid designed to promote or facilitate the development of certain areas, with the exception of San Roque (Cadiz), none of the areas where Indosa, Gursa and Cunosa are based (Derio (Vizcaya), Guriezo and Limpias (Cantabria)) have an abnormally low standard of living or serious under-employment within the meaning of Article 92(3)(a). Moreover, although the plant is in an assisted area, as referred to in Article 92(3)(c), the aid granted to these companies does not have the character of aid designed to promote the development of certain economic areas, as provided for in the above Article, because it was granted as operating aid (that is, aid the granting of which is not conditional on investment or job creation). The aid granted in San Roque (Cadiz) was not part of the regional aid scheme in that area. However, operating aid in the areas provided for by Article 92(3)(a) of the Treaty may also be covered by the derogation set out in that provision where such aid is granted subject to certain restrictive, controlled conditions, described below with reference to companies in difficulty.

As regards the exceptions provided for by Article 92(3)(b), the aid measures analysed are not concerned with, nor do they have the character of 'an important project of common European interest' or a project 'to remedy a serious disturbance' in the Spanish economy. Moreover, the Spanish authorities have not requested any derogation on these grounds.

Article 92(3)(c) also provides for an exception to be made for 'aid to facilitate the development of certain economic activities'. The aid granted to Indosa, Cunosa, Migsa and Gursa falls into the category of aid to companies in difficulty.

The aid granted does not fulfil the conditions for a derogation laid down in Article 92(3)(c) in conjunction with the 'Community guidelines on state aid for rescuing and restructuring firms in difficulty' [17].

The aid does not meet the conditions laid down in the guidelines on rescue aid. Restructuring aid must be linked with a viable restructuring programme which must be submitted in detail to the Commission. In the present case, the Spanish authorities have not provided any evidence that the aid granted to the companies concerned is linked with a programme of restructuring designed to restore their long-term viability. It is worth pointing out that a plan submitted to the Basque authorities in 1996 by the receivers administering Indosa's bankruptcy was not accepted by the authorities because, among other things, it failed to put forward a realistic proposal on Indosa's institutional debt (towards the regional Treasury, the Social Security, and other agencies).

The fact that Indosa now has hopes of a positive cash flow does not negate the fact that it, and the other companies in question, were able to continue operating firstly thanks to the non-recovery of the aid declared incompatible in 1989 and secondly because it was not compelled to meet its tax and

[16] See footnote 15.

[17] OJ C 368, 23.12.1994, p. 12.

social security obligations. Had that not been the case, it would have ceased to operate.

The Commission therefore takes the view that the aid is incompatible with the common market as referred to in Article 92(1) of the Treaty because it does not meet any of the necessary requirements for the application of any of the derogations provided for in Article 92(2) and (3).

When aid is deemed incompatible with the common market, the Commission requires the Member States to call on the beneficiary to pay it back [18]. Since this is the case with the measures in favour of Indosa, Cunosa, Migsa and Gursa, which are the subject of the present Decision, the aid must be recovered.

The aid must be recovered in accordance with the procedures and provisions laid down in Spanish law, and must include the interest which has accrued between the date on which the aid was granted and the date on which it is actually repaid, calculated at a rate equal to the percentage value on that date of the reference rate used to calculate the net grant equivalent of regional aid in Spain [19].

In accordance with the case-law of the Court of Justice, the abovementioned provisions must be applied in such a way as to ensure that it is not in practice impossible to recover the aid as required by Community law. Any difficulties, of a procedural or other nature, which may arise in applying the measure will not affect its legal validity [20],

HAS ADOPTED THIS DECISION:

Article 1

The aid in the form of the persistent non-payment of taxes and social security contributions:

— by Indosa and Cunosa until they were declared bankrupt,

— by Migsa and Gursa until their activities were interrupted, and

— by Indosa after its declaration of bankruptcy and until May 1997,

is illegal, as it was granted by Spain in breach of its obligations under Article 93(3) of the EC Treaty.

The aid is considered to be incompatible with the common market within the meaning of Article 92(1) of the Treaty, as it does not meet any of the necessary conditions for the application on any of the derogations provided for by Article 92(2) and (3).

Article 2

1. Spain shall take the necessary measures to recover from the beneficiaries the aid referred to in Article 1 which was granted to them illegally.

2. The aid shall be recovered in accordance with the procedures and provisions laid down in Spanish law. The sums to be recovered shall include the interest which has accrued between the granting of the aid and the date on which it is actually repaid. The interest shall be calculated on the basis of the reference rate used to calculate the net grant equivalent of regional aid in Spain.

Article 3

Spain shall inform the Commission within a period of two months from the date of notification of the present Decision of the measures to be taken to comply therewith.

Article 4

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 14 October 1998.

For the Commission

Karel VAN MIERT

Member of the Commission

([18]) Commission communication of 24 November 1983 (OJ C 318, 24.11.1983, p. 3). See also the Court of Justice's judgments of 12 July 1973 in Case 70/72 Commission v. Germany [1973] ECR 813, and 24 February 1987 in Case 310/85 Deufl v. Commission [1987] ECR 901.

([19]) Letter from the Commission to the Member States SG (91) D/4577, 4 March 1991. See also the Court of Justice's decision of 21 March 1990 in Case 142/87 Belgium v. Commission [1990] ECR I-959.

([20]) See the judgment cited in footnote 19, paragraphs 58 to 63.